IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

(1) RHONDA MENGERT,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 19-CV-00304-JED-JFJ**
	)	
(1) U.S. TRANSPORTATION SECURITY ADMINISTRATION;	)	
(2) UNKNOWN U.S. TRANSPORTATION SECURITY ADMINISTRATION AGENT 1;	)	
(3) UNKNOWN U.S. TRANSPORTATION SECURITY ADMINISTRATION AGENT 2,	)	
	)	
Defendants.	)	

INDIVIDUAL DEFENDANTS' MOTION TO DISMISS
PLAINTIFF'S FIRST AMENDED COMPLAINT & BRIEF IN SUPPORT

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Come now the individual-capacity Defendants, nominally sued as "Unknown U.S. Transportation Security Administration Agent[s] 1" and "2" (collectively, the "Individual Defendants"),[1] and pursuant to Federal Rule of Civil Procedure 12(b)(6), respectfully move the Court to dismiss the Fourth Amendment claims asserted against them in Plaintiff's First Amended Complaint (Doc. 12). In support of this motion, the Individual Defendants rely on the following memorandum of points and authorities.

I. BACKGROUND AND SUMMARY OF ARGUMENT

Plaintiff Rhonda Mengert brings this action based on her pre-flight security screening at a Transportation Security Administration (TSA) checkpoint in Tulsa International Airport (TUL) on May 12, 2019. The events alleged in Plaintiff's First Amended Complaint, although not admitted, are summarized below.

At the checkpoint, Plaintiff was screened with a walk-through Advanced Imaging Technology (AIT) scanner. (Doc. 12 at ¶¶ 21, 23). The AIT scanner alarmed to indicate the possible presence of an item being carried on Plaintiff's body or in her clothing, and she was therefore required to undergo a pat-down procedure to resolve the alarm. *Id.* at ¶ 23. During the pat-down, the female TSA employee who was performing the procedure felt a "feminine hygiene product" that Plaintiff was wearing inside of her underwear. *Id.* at ¶¶ 23-27. Plaintiff alleges that she was subsequently required to go with two female TSA employees to a private screening room

[1] After undersigned counsel assumed representation of the Individual Defendants, the Transportation Security Administration disclosed their identities (female Transportation Security Officers Amanda Morroney and Whitney Brown) to Plaintiff's counsel in response to a subpoena on October 10, 2019. Plaintiff has yet to name these individuals as parties-defendants in a further amendment. *See* (Doc. 12 at ¶ 8) ("Plaintiff will use discovery to identify the true names of the defendants and will move the Court for leave to amend this Complaint with the same."). Nonetheless, the Individual Defendants are proceeding with this motion in the interest of moving the litigation forward.

at the checkpoint, lower her pants and underwear to remove the "feminine hygiene product" she was wearing, and show the item to the TSA employees "for their visual inspection." *Id.* at ¶ 37. Plaintiff further alleges that after the visual inspection was complete, she asked to leave the private screening room three times, but the TSA employees ignored her requests, and she was not permitted to leave until she asked a fourth time. *Id.* at ¶¶ 41-42.

As relevant here, Plaintiff asserts two counts against the Individual Defendants, seeking damages for alleged Fourth Amendment violations under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). (Doc. 12 at ¶¶ 53-66).[2] These claims should be dismissed for two reasons. First, the Court ought not create a *Bivens* damages remedy in the circumstances of this case since it presents a "new context," *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), there are alternate processes for protecting Plaintiff's asserted interests, and numerous "special factors" strongly counsel against the creation of a non-statutory damages remedy. Second, any *Bivens* claim is barred by qualified immunity.

II. STANDARD OF REVIEW

To state a claim, a complaint must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citation omitted). The standard requires "enough facts to state a claim to relief that is plausible on its face," and not merely "speculative." *Id.* at 555–56, 570 (citations

[2] Plaintiff also asserts claims against TSA, which TSA has separately moved to dismiss. (Doc. 21). In this motion, the Individual Defendants address only the *Bivens* claims. Although Plaintiff also asserts two state-law tort counts against the Individual Defendants, (Doc. 12 at ¶¶ 67-78), the United States has moved to substitute itself as sole party-defendant to those counts under the Westfall Act, (Doc. 8), and also moved to dismiss those counts, (Doc. 21). Accordingly, the Individual Defendants do not address the state-law claims here. If the United States is not substituted as sole party-defendant to the state-law claims, the Individual Defendants respectfully request the opportunity to submit a separate, supplemental brief addressing them.

omitted). The Court must accept all well-pleaded, non-conclusory allegations as true and construe them in the light most favorable to the plaintiff. *Id.* at 555.

III. ARGUMENT

A. The Court should not recognize a *Bivens* remedy in this novel context.

In *Bivens*, the Supreme Court "recognized for the first time an implied action for damages against federal officers alleged to have violated a citizen's constitutional rights." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 66 (2001). That judicially created cause of action for constitutional violations, however, "is not an automatic entitlement" in the case of every alleged government infraction. *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007). To the contrary, the Supreme Court has authorized "an implied damages remedy under the Constitution itself" just three times. *Abbasi*, 137 S. Ct. at 1855. Those cases involved: (1) Fourth Amendment claims against agents of the Federal Bureau of Narcotics, *Bivens*, 403 U.S. at 389; (2) a Fifth Amendment Equal Protection Claim brought by a former congressional administrative assistant against the Congressman who admitted firing her because she was a woman, *Davis v. Passman*, 442 U.S. 228, 230 (1979); and (3) Eighth Amendment claims asserted by the estate of a deceased prisoner against prison officials who allegedly failed to treat his asthma, causing his death, *Carlson v. Green*, 446 U.S. 14, 17 (1980).

The Court has not recognized any new *Bivens* remedy since *Carlson*, but "it has reversed more than a dozen appellate decisions that had created new actions for damages." *Vance v. Rumsfeld*, 701 F.3d 193, 198 (7th Cir. 2012) (en banc); *see also Abbasi*, 137 S. Ct. at 1857 (listing eight cases in which the Supreme Court "declined to create an implied damages remedy" for an alleged constitutional violation). As the Supreme Court has "consistently refused to extend *Bivens* liability to any new context or category of defendants" for almost 40 years, *Malekso*, 534 U.S. at

68, the *Bivens* decision is best viewed as "a relic of the heady days in which [the Supreme Court] assumed common-law powers to create causes of action—decreeing them to be 'implied' by the mere existence of a statutory or constitutional prohibition," *id.* at 75 (Scalia, J., concurring). The Court's most recent refusal to expand the *Bivens* remedy, in *Abbasi*, makes this abundantly clear. The Court reiterated that "expanding the *Bivens* remedy is now a 'disfavored' judicial activity." 137 S. Ct. at 1857 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009)). And it intimated that the outcome of even "the Court's three *Bivens* cases might have been different if they were decided today." *Id.* at 1856.[3]

Before permitting a lawsuit to proceed on a *Bivens* theory, a district court must first determine whether the case "is different in a meaningful way" from *Bivens*, *Davis*, or *Carlson*. *Abbasi*, 137 S. Ct. at 1859. If so, "then the context is new." *Id.* The Supreme Court "has urged caution before extending *Bivens* remedies into any new context." *Id.* at 1857 (quotations omitted). Indeed, a district court must approach putative constitutional claims against individual-capacity federal defendants arising in a new context with the presumption that a *Bivens* remedy is not available. *See, e.g.*, *Farah v. Weyker*, 926 F.3d 492, 500 (8th Cir. 2019) ("[R]ecognizing the [Supreme Court]'s caution in this regard, we have adopted a presumption against judicial

[3] Notably, the Court of Appeals for the Tenth Circuit has not issued a decision regarding the availability of a *Bivens* claim in a new context since the Supreme Court decided *Abbasi* in June 2017. But the Court of Appeals had previously expressed its agreement with the overall thrust of the *Abbasi* decision: "If we were writing on a blank slate, we might be persuaded that *Bivens* is a relic of another era, and that Congress is perfectly capable of policing federal misconduct." *Big Cats of Serenity Springs, Inc. v. Rhodes*, 843 F.3d 853, 864 (10th Cir. 2016). In light of *Abbasi*, there is reason to doubt the continued viability of any older Tenth Circuit decisions that permitted even modest extensions of the *Bivens* remedy. *See Abbasi*, 137 S. Ct. at 1864 ("[E]ven a modest extension is still an extension."); *White v. Sloop*, 772 F. App'x 334, 335 (7th Cir. Jun. 20, 2019) ("[T]his court has recognized similar claims in cases preceding *Abbasi*. But, since *Abbasi*, the *Bivens* framework has narrowed substantially to limit lawsuits against federal agents; this court's past pronouncements are thus not controlling." (quotation and citation omitted)).

recognition of direct actions for violation of the Constitution by federal officials." (quotations omitted)); *Sibley v. Roberts*, 224 F. Supp. 3d 29, 37 n.7 (D.D.C. 2016) (noting "the strong presumption against creating new *Bivens* remedies"); *Heap v. Carter*, 112 F. Supp. 3d 402, 431 (E.D. Va. 2015) (same).[4] This presumption accords with the Supreme Court's frequent reminders "that Congress is in a better position to decide whether or not the public interest would be served by creating *Bivens* actions in new situations." *Lebron v. Rumsfeld*, 670 F.3d 540, 548 (4th Cir.) (quotation omitted), *cert. denied*, 132 S. Ct. 2751 (2012).

When a case arises in a new context, and prudence thus demands "restraint" and "skepticism" towards a putative individual-capacity claim, *id.*, a district court must perform a two-part analysis to determine whether a *Bivens* remedy should be recognized. *Wilkie*, 551 U.S. at 550. First, "there is the question whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Id.* Second, "even in the absence of such alternative, a *Bivens* remedy is a subject of judgement: the federal courts must take the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counseling hesitation before authorizing a new kind of federal litigation." *Id.* (quotations omitted).

The Supreme Court "has not defined the phrase 'special factors counseling hesitation,'" but the "necessary inference . . . is that the inquiry must concentrate on whether the Judiciary is

[4] *See also Cioca v. Rumsfeld*, 720 F.3d 505, 510 (4th Cir. 2013) ("It is clear that expansion of a *Bivens*-based cause of action . . . is the exception, not the rule."); *Arar v. Ashcroft*, 585 F.3d 559, 571 (2d Cir. 2009) (en banc) ("The Supreme Court has warned that the *Bivens* remedy is an extraordinary thing that should rarely if ever be applied in new contexts." (quotations omitted)), *cert. denied*, 560 U.S. 978 (2010); *Vanderklok v. United States*, 868 F.3d 189, 199 (3d Cir. 2017) ("[T]he Supreme Court has plainly counseled against creating new *Bivens* causes of action.").

well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." *Abbasi*, 137 S. Ct. at 1857-58. "Thus, to be a 'special factor counselling hesitation,' a factor must cause a court to hesitate before answering that question in the affirmative." *Id.* at 1858. This standard – that any factor counsels hesitation in recognizing a *Bivens* remedy in a new context – "is remarkably low." *Arar*, 585 F.3d at 574. "'Hesitation' is 'counseled' whenever thoughtful discretion would pause even to consider." *Id.*; *see also Richardson v. United States*, No. 18-cv-763, 2019 WL 4038223, at *6 (W.D. Okla. Jun. 28, 2019) ("The plain meaning of the language [special factors counseling hesitation] suggests that the threshold for finding special factors is quite low[.]"), *report & recommendation adopted by* 2019 WL 4017616 (W.D. Okla. Aug. 26, 2019).

(i) This case presents a new context.

This case clearly presents a "new context" under *Abbasi*. Plaintiff's allegations differ significantly from those in *Bivens*, *Davis*, and *Carlson*, and she seeks to pursue an individual-capacity damages remedy against an entirely new category of federal employee – TSA screeners who are not law enforcement officers. *See* (Doc. 22 at 11) (stating that Plaintiff "is willing to stipulate" that TSA screeners are not law enforcement officers and are not empowered to make arrests or conduct criminal law enforcement searches); *Vanderklok*, 868 F.3d at 208 ("TSA employees typically are not law enforcement officers and do not act as such."). Moreover, although Plaintiff has asserted claims under the Fourth Amendment, which was the constitutional provision at issue in *Bivens* itself, her claims arise in a fundamentally different setting – an administrative search at an airport security screening checkpoint – and concern different aspects of the Amendment's protection. The allegations in *Bivens* included warrantless entry into a home and use of unreasonable force in making an arrest. 403 U.S. at 389. Plaintiff here has not alleged

excessive force, invasion of her home, or arrest; instead, she has claimed only intrusion on her privacy caused by brief exposure of her partially unclothed body to the view of two other members of her gender in a private room necessitated by an alarm during a security screening procedure. *Bivens* remedies "are not recognized Amendment by Amendment in wholesale fashion," but rather, "are context-specific." *Wilson v. Libby*, 498 F. Supp. 2d 74, 86 (D.D.C. 2007), *aff'd*, 535 F.3d 697 (D.C. Cir. 2008). Thus, this case cannot be considered to arise in the same context as *Bivens* simply because Plaintiff has invoked the Fourth Amendment. *See Vanderklok*, 868 F.3d at 199-200 ("It is not enough to argue, as [plaintiff] does, that First Amendment retaliation claims have been permitted under *Bivens* before. We must look at the issue anew in this particular context, airport security, and as it pertains to this particular category of defendants, TSA screeners."); *Richardson*, 2019 WL 4038223, at *4 ("[T]he test is more than simply determining 'whether the asserted constitutional right was at issue in a previous *Bivens* case,' and, if so, 'whether the mechanism of injury was the same mechanism of injury in a previous *Bivens* case.'" (quoting *Abbasi*, 137 S. Ct. at 1859)); *see also Scruggs v. Nielsen*, No. 18-cv-2109, 2019 WL 1382159, at *5 & n.9 (N.D. Ill. Mar. 27, 2019) ("new context" presented by proposed Fourth and Fifth Amendment *Bivens* claims challenging TSA screening).

Because this case arises in a new context, this Court should presume that a *Bivens* remedy is unavailable for Plaintiff's claims and cautiously undertake the two-part analysis set forth in *Abbasi* and *Wilkie*. As explained below, that analysis confirms that the Court should decline to extend a *Bivens* remedy under the circumstances here.

(ii) Existing Processes Preclude Recognition of Plaintiff's Claims.

If "there is an alternative remedial structure present," that "alone may limit the power of the Judiciary to infer a new *Bivens* cause of action." *Abbasi*, 137 S. Ct. at 1858; *see id.* at 1863

("when alternative methods of relief are available, a *Bivens* remedy usually is not"); *accord id.* at 1865. The availability of *any* forum that allows a plaintiff to challenge agency decisions or bring to light allegedly unconstitutional conduct can be enough to preclude recognition of a *Bivens* claim. *See, e.g.*, *Bagola v. Kindt*, 131 F.3d 632, 644 (7th Cir. 1997) ("Administrative schemes that expose unconstitutional conduct by government officials, even if they do not provide a distinct remedy for that conduct, serve a deterrent purpose that renders the availability of a *Bivens* claim less essential."); *Richardson*, 2019 WL 4038223, at *5 (finding that the existence of alternative redress processes "foreclose[d] the creation of a *Bivens* remedy," and explaining that "the prisoner grievance system" provides "a means through which allegedly unconstitutional actions may be brought to the attention of the [Bureau of Prisons] and prevented from recurring").

Here, Plaintiff plainly has "*some* procedure to defend and make good on [her] position" outside the *Bivens* arena. *Wilkie*, 551 U.S. at 552 (emphasis added). Airline passengers may potentially seek injunctive relief from TSA screening procedures that they believe to be unconstitutional. Congress has provided for, and channeled, such relief through a petition for review in an appropriate federal court of appeals. 49 U.S.C. § 46110.[5] The ability to seek review of TSA screening in a court of appeals is certainly a "meaningful safeguard" for airline passengers like Plaintiff. *Nat'l Commodity & Barter Ass'n v. Gibbs*, 886 F.2d 1240, 1248 (10th Cir. 1989).[6]

[5] *See, e.g.*, *Blitz v. Napolitano*, 700 F.3d 733, 739-40 (4th Cir. 2012); *Redfern v. Napolitano*, 727 F.3d 77, 83 n.3 (1st Cir. 2013).

[6] *See Abbasi*, 137 S. Ct. at 1862-63, 1865 (injunctive relief was an alternative process considered in new-context and special-factors analyses); *K.B. v. Perez*, 664 F. App'x 756, 759 (10th Cir. Dec. 2, 2016) (refusing to recognize a *Bivens* claim for violation of the constitutional right to familial association brought by probationer's daughter who was denied visitation based on finding that alternative remedies were available in the form of "filing a grievance" through the probation program's administrative remedy process and "bringing a federal suit for injunctive relief"); *Zavala v. Rios*, 721 F. App'x 720, 722 (9th Cir. 2018) (no *Bivens* remedy for inmate challenging interference with mail as "[i]njunctive and declaratory relief would prevent future constitutional harm"); *Censke v. Fox*, No. 17-cv-1116, 2018 WL 4624863, at *3 (W.D. Okla. Aug. 17, 2018)

Additionally, Plaintiff can pursue monetary remedies under state tort law and the Federal Tort Claims Act (FTCA). *See Vanderklok*, 868 F.3d at 204 ("[T]here can be a remedy against the United States [under the FTCA] in cases where the employee had the responsibility of [an investigative or law enforcement] officer, and there can be a state law remedy against the individual when the offending TSA employee acted outside the scope of employment."); *Weinraub v. United States*, 927 F. Supp. 2d 258, 260 (E.D.N.C. 2012) (describing the FTCA administrative claim presented to TSA by a traveler claiming "mental anguish and emotional distress over his treatment by the TSA screeners").[7] Indeed, Plaintiff is pursuing relief under the FTCA and

(declining to recognize *Bivens* cause of action based on finding that "a prisoner could seek injunctive relief against prison officials" as an alternative means of seeking "legal redress" for First Amendment retaliation claims), *report & recommendation adopted by* 2018 WL 4623662 (W.D. Okla. Sep. 26, 2018); *cf. Fowler v. Lawson*, No. 05-cv-1255, 2007 WL 1365328, at *2-3 (W.D. Okla. May 9, 2007) (declining to recognize Fourth Amendment *Bivens* claim against inspectors who "seized and retained [plaintiff's] business records following an administrative inspection" because Federal Rule of Criminal Procedure 41 afforded an alternative remedial process by allowing for a motion for the return of seized property).

[7] Nearly forty years ago (and obviously prior to *Abbasi*), the Supreme Court rejected the argument that the availability of the FTCA process, by itself, precluded recognition of a *Bivens* action. *Carlson*, 446 U.S. at 19. But the Court, which has dramatically evolved its approach to *Bivens* claims since then, has never indicated that the existence of the FTCA process is irrelevant when considered together with other special factors. *See generally Abbasi*, 137 S. Ct. at 1856 ("[I]n light of the changes to the Court's general approach to recognizing implied damages remedies, it is possible that the analysis in the Court's three *Bivens* cases might have been different if they were decided today."); *Daniels v. Williams*, 474 U.S. 327, 332 (1986) ("Our Constitution . . . does not purport to supplant traditional tort law."). Indeed, the Supreme Court has expressly considered the availability of tort claims when refusing to imply a *Bivens* remedy. *See Minneci*, 565 U.S. at 120 (declining to recognize a *Bivens* action where "state tort law authorizes adequate alternative damages actions"); *see also Andrews v. Miner*, 301 F. Supp. 3d 1128, 1134-35 (N.D. Ala. 2017) (acknowledging that, under *Carlson*, "[t]he FTCA remedy is not a substitute for a *Bivens* action," but still considering "an effective and available [FTCA] remedy"—whose "administrative prerequisites" the plaintiff "failed to follow"—in the mix with other "special factors"); *accord Abdoulaye v. Cimaglia*, 2018 WL 1890488, *7 (S.D.N.Y. Mar. 30, 2018); *Morgan v. Shivers*, 2018 WL 618451, *5-6 (S.D.N.Y. Jan. 29, 2018).

Oklahoma tort law in this very case,[8] which makes recognition of a *Bivens* action all the more "improper." *Ingram v. Faruque*, No. 11-cv-188, 2011 WL 5122685, at *3 (W.D. Okla. Oct. 27, 2011) (relying on the possibility that plaintiff "*may* be able to amend his complaint to state a claim for relief within the scope of the FTCA" when refusing to recognize a Fourth Amendment *Bivens* claim(emphasis added)), *aff'd*, 728 F.3d 1239 (10th Cir. 2013); *see also Williams v. Aulepp*, No. 16-cv-3044, 2018 WL 5807105, at *14 (D. Kan. Nov. 6, 2018) (considering that "Congress has waived immunity for some (but not all) tortious acts under the FTCA" when concluding that inmates "have extensive procedural mechanisms and remedies available for legitimate grievances").[9]

Apart from in-court avenues, an "alternative remedial structure" under *Abbasi*, 137 S. Ct. at 1858, "can take many forms, including *administrative*, statutory, [and] equitable" processes, *Vega v. United States*, 881 F.3d 1146, 1154 (9th Cir. 2018) (emphasis added). Relevant here, the Department of Homeland Security (DHS) – TSA's parent department within the Executive Branch – has established a civil rights complaint process that plainly provides Plaintiff with "a significant opportunity to expose allegedly unconstitutional conduct." *Bagola*, 131 F.3d at 643. Congress directed the DHS Office for Civil Rights and Civil Liberties (CRCL) to "review and assess information concerning abuses of civil rights, civil liberties, and profiling . . . by employees and

[8] Regardless of the outcome of this particular Plaintiff's efforts to utilize state tort law and the FTCA process, it is clear as a general matter that those means have the potential to provide meaningful monetary relief to travelers aggrieved by interactions with TSA screeners. And when no recovery is possible by those means, "that is by design" rather than a systemic problem that should be fixed by permitting a *Bivens* claim. *Vanderklok*, 868 F.3d at 204 (citing *United States v. Smith*, 499 U.S. 160, 166 (1991) ("Congress recognized that the required substitution of the United States as the defendant in tort suits filed against government employees would sometimes foreclose a tort plaintiff's recovery altogether.")).

[9] *Cf. AAA Pharmacy, Inc. v. Palmetto GBA, LLC*, No. 07-cv-1221, 2008 WL 5070958, at *5 (W.D. Okla. Nov. 24, 2008) ("The availability of *possible* relief under the Tucker Act is a special factor that counsels against *Bivens* liability." (emphasis added and citation omitted)).

officials of the Department," including TSA employees. 6 U.S.C. § 345(a)(1). Congress further specifically directed CRCL to "investigate complaints and information indicating possible abuses of civil rights or civil liberties." *Id.* at (a)(6).[10] "[W]here Congress has already constructed a constitutionally adequate remedy for federal misconduct, courts ought not step in by implying a *Bivens* cause of action." *Big Cats of Serenity Springs*, 843 F.3d at 859. Indeed, post-*Abbasi*, several courts have declined to create *Bivens* remedies in light of the availability of comparable administrative review, whether alone or in combination with other processes or special factors. *See, e.g.*, *Liff v. Office of Inspector Gen.*, 881 F.3d 912, 920-21 (D.C. Cir. 2018) (no *Bivens* remedy for government contractor where a "constellation of statutes and regulations . . . provide a remedy" for "contracting-related disputes," including "myriad" administrative processes).[11]

[10] *See also* DHS Management Directive No. 3500 (May 19, 2004), available at: https://www.dhs.gov/sites/default/files/publications/crcl-directive-3500.pdf (describing CRCL's roles and responsibilities); 42 U.S.C. § 2000ee-1 (requiring the Secretary to "designate not less than 1 senior officer" to ensure that the Department "appropriately consider[s] … civil liberties concerns when … officials are proposing, developing, or implementing laws, regulations, policies, procedures, or guidelines related to efforts to protect the Nation against terrorism," "periodically investigate and review department, agency, or element actions, policies, procedures, guidelines, and related laws and their implementation to ensure that such department, agency, or element is adequately … civil liberties in its actions," and "has adequate procedures to receive, investigate, respond to, and redress complaints").

[11] *See also Vega*, 881 F.3d at 1154 & n.4 (no *Bivens* remedy for inmate in part because BOP Administrative Remedy Program "provide[d] an adequate, and more appropriate, remedy to vindicate [his] rights"); *Aulepp*, 2018 WL 5807105, at *14 (finding adequate existing remedies based in part on the fact that "Congress . . . has also authorized the [Bureau of Prisons] to establish an extensive administrative program for resolution of inmate grievances"); *Doe H. v. Haskell Indian Nations Univ.*, 266 F. Supp. 3d 1277, 1285-86 (D. Kan. 2017) (no *Bivens* remedy for former student alleging discrimination by officials at federally owned university given availability of administrative process mandated by presidential Executive Order); *Muhammad v. Gehrke*, No. 15-cv-334, 2018 WL 1334936, at *4 (S.D. Ind. Mar. 15, 2018) (no *Bivens* remedy for inmate who could challenge "retaliation" through BOP administrative-remedy process, the FTCA, and habeas); *Swyers v. USPTO*, No. 16-cv-15, 2016 WL 7042943, at *11-12 (E.D. Va. May 27, 2016) (recognizing that internal agency process within which to raise allegations of wrongdoing was an alternative process for purposes of the first prong of the *Wilkie* test).

In addition to the CRCL complaint process, Plaintiff also had another, more immediately available avenue for raising her allegations and seeking redress: she could have complained to both law enforcement officers and TSA management officials at the checkpoint where she was screened. *See* Passenger Screening Using Advanced Imaging Technology, 81 Fed. Reg. 11,364, 11,374 (Mar. 3, 2016) (final rule) ("TSA takes all allegations of misconduct seriously. Passengers who believe they have experienced unprofessional conduct at a security checkpoint may request to speak to a supervisor at the checkpoint[.]"). Raising a complaint at the checkpoint can result in serious consequences for TSA employees who are found to have violated a traveler's rights. For example, TSA screeners may face disciplinary sanctions up to loss of employment, and they may be subject to the criminal justice process. *See, e.g.*, *Cho v. Oquendo*, No. 16-cv-4811, 2017 WL 3316098, at *2 (E.D.N.Y. Aug. 2, 2017) (noting that a TSA screener was immediately fired for sexually assaulting a passenger); *People v. Oquendo*, No. 2015QN043395 (Queens County N.Y.) (documenting arrest, arraignment, and guilty plea of the same TSA screener). Travelers' ability to complain about the behavior of TSA screeners and have those screeners held accountable is a significant means of redressing claims of the type Plaintiff has asserted here. *See, e.g.*, *De La Paz v. Coy*, 786 F.3d 367, 376-77 (5th Cir. 2015) (noting the fact that Customs and Border Protection "[a]gents may be prosecuted criminally for violating aliens' rights against excessive force" as one of the existing protections of the plaintiff's rights that made a *Bivens* remedy unnecessary).

"Taken together," *Chappell v. Wallace*, 462 U.S. 296, 304 (1983), the various processes for air travelers to raise complaints and seek redress confirm that "this is not a case . . . in which 'it is damages or nothing,'" *Abbasi*, 137 S. Ct. at 1862-63, 1865 (certain internal quotation marks omitted). Because the existing processes provide Plaintiff with adequate fora for bringing to light allegations of constitutional violations, a "new and freestanding remedy in damages," *Wilkie*, 551

U.S. at 550, against TSA screeners is unnecessary and inappropriate under the circumstances here. *See Big Cats of Serenity Springs*, 843 F.3d at 859 ("[W]here an alternative, existing process is capable of protecting the constitutional interests at stake, the courts should refrain from augmenting the process with an implied damages remedy." (quotation omitted)).

(iii) Additional Special Factors Preclude Plaintiff's Claims.

Regardless of whether a plaintiff has other available recourse, recognizing "a *Bivens* remedy is a subject of judgment: the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed . . . to any special factors counseling hesitation before authorizing a new kind of federal litigation." *Wilkie*, 551 U.S. at 550 (quotation omitted); *see also Bivens*, 403 U.S. at 396 (a constitutional remedy should not be implied where "special factors counsel[] hesitation in the absence of affirmative action by Congress"). In any particular case, "[t]he range of concerns" that may constitute special factors is "broad." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 280 (1997) (Kennedy, J., concurring) (citation omitted). And "[t]he only relevant threshold – that a factor 'counsels hesitation' – is remarkably low." *Arar*, 585 F.3d at 574. Special factors should be considered in the aggregate,[12] and this case implicates several.

First, Congress has paid "repeated and careful attention" to both TSA screening operations and the protection of civil rights and liberties across all DHS functions, including TSA screening. *De La Paz*, 786 F.3d at 377. Despite legislating extensively with regard to those issues since 9/11, Congress has never authorized a cause of action for damages against TSA screeners in their

[12] *See Chappell*, 462 U.S. at 304; *Meshal v. Higgenbotham*, 804 F.3d 417, 425-26 (D.C. Cir. 2015) ("We do not here decide whether either factor alone would preclude a *Bivens* remedy, but both factors taken together do so.").

individual capacities.[13] Instead, "Congress chose to *limit* the scope of judicial review of TSA actions. In creating the TSA, Congress restricted judicial review to affirming, amending, modifying, or setting aside orders of the agency." *Vanderklok*, 868 F.3d at 208 (emphasis added) (citing 49 U.S.C. § 46110(c)). Moreover, when it legislated with respect to passenger grievances arising from TSA screening, Congress chose to establish only an administrative procedure, not a federal-court damages claim.[14] Additionally, Congress affirmatively provided a remedy for travelers claiming property damage as a result of TSA screening, by permitting the agency to "settle a claim for not more than $1,000 for damage to, or loss of, privately owned property." 31 U.S.C. § 3723. Such claims are resolved according to TSA's administrative process. 28 U.S.C. § 2675(a). The same is true of claims that TSA screeners inflicted personal injury, including emotional distress, on a passenger.[15]

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[13] Since creating TSA with the Aviation and Transportation Security Act of 2001, Congress has enacted significant legislation nearly every year with regard to airport security screening and traveler redress processes. *See, e.g.*, 49 U.S.C. §§ 44926 (requiring the establishment of "a timely and fair redress process for individuals who believe they have been delayed or prohibited from boarding a commercial aircraft because they were wrongly identified as a threat"); 44903(j)(2)(G) (requiring the establishment of "a timely and fair process for individuals identified as a threat . . . to appeal to the Transportation Security Administration the determination and correct any erroneous information"); *see also Ruskai v. Pistole*, 775 F.3d 61, 63-64 (1st Cir. 2014); *Corbett v. T.S.A.*, 767 F.3d 1171, 1175 (11th Cir. 2014); and *Elec. Privacy Info. Ctr. v. U.S. D.H.S.*, 653 F.3d 1, 3 (D.C. Cir. 2011) (each discussing legislation enacted post-ATSA in 2004 and 2012, to improve TSA's airport screening procedures).

[14] *Vanderklok*, 868 F.3d at 208 ("[W]e cannot ignore that the remedies in the airport security context are circumscribed as a direct result of Congressional decisions. Congress decided the scope of tort liability for the government and government employees and Congress allowed the creation of an administrative mechanism by which to adjudicate certain TSA complaints. We should hesitate to create new remedies when it appears that the available ones are limited by Congressional design." (internal citations omitted)).

[15] *See Weinraub*, 927 F. Supp. 2d at 260 (describing FTCA administrative claim for plaintiff's "mental anguish and emotional distress over his treatment by the TSA screeners"). TSA makes claim forms available to the public on-line: https://www.tsa.gov/travel/passenger-support/claims.

Moreover, Congress has considered bills to provide additional or alternative procedures.[16] None included the remedy of a damages cause of action. The only time that was considered in a remotely similar context – the remedial scheme available to passengers allegedly aggrieved by their placement on the "No Fly List" – Congress considered, *but voted against*, an amendment that would have authorized a damages remedy against the government. H.R. Rep. No. 108-724, pt. 5, at 270-71 (2004).[17]

Despite Congress's clear recognition that disputes might arise over the propriety of TSA conduct, it has not provided the remedy Plaintiff seeks. The Court should respect that decision and not augment the processes Congress provided. *See Abbasi*, 137 S. Ct. at 1862 (congressional "silence" with respect to a damages remedy "is relevant . . . and . . . telling"). Like the Third Circuit in *Vanderklok*, this Court "should hesitate to create" additional remedies under *Bivens* "when it appears that the available ones are limited by Congressional design." 868 F.3d at 208; *see also Wilkie*, 551 U.S. at 562 ("Congress is in a far better position than a court to evaluate the impact of a new species of litigation against those who act on the public's behalf." (quotation omitted)).

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[16] *See* S. 2207 § 2, 112th Cong. (2012) (proposing a TSA Ombudsman's Office to "record complaints from the general public regarding [TSA] screening practices" and "resolve passenger complaints at airports accusing TSA employees of mistreatment"); S. 3302 §§ 3, 11, 112th Cong. (2012) (considering an "Air Travelers' Bill of Rights" that would be incorporated into TSA policies and practices and displayed in TSA screening areas); H.R. 1583 § 2, 113th Cong. (2013) (considering an administrative appeals system for passengers who believe they were "wrongly delayed" or "denied a right, benefit, or privilege" because they were "wrongly identified as a threat when screening against the terrorist watchlist").

[17] *See Tanvir v. Lynch*, 128 F. Supp. 3d 756, 773 n.15 (S.D.N.Y. 2015) ("Congress considered the question of what remedies would be appropriate in the context of the No Fly List and specifically rejected the option of a civil remedy"), *rev'd on other grounds sub nom.*, *Tanvir v. Tanzin*, 894 F.3d 449 (2d Cir. 2018), *cert. granted*, No. 19-71, 2019 WL 6222538 (U.S. Nov. 22, 2019).

Second, a TSA security screening checkpoint is a "uniquely sensitive area" where the actions or inactions of screeners can have national security implications. *Mocek v. City of Albuquerque*, 813 F.3d 912, 924 (10th Cir. 2015). TSA's operations are an essential part of the national security apparatus developed to prevent attacks like 9/11. *See Vanderklok*, 868 F.3d at 207 ("TSA employees . . . are tasked with assisting in a critical aspect of national security[.]"); *Mohamed v. Holder*, 995 F. Supp. 2d 520, 527 (E.D. Va. 2014) ("Today, we are at war with those who would, if possible, use a commercial aircraft as an instrument of mass murder."). And courts have repeatedly recognized that TSA screeners' work serves the most compelling of government interests. *See, e.g.*, *United States v. Hartwell*, 436 F.3d 174, 179 (3d Cir. 2006) ("[T]here can be no doubt that preventing terrorist attacks on airplanes is of paramount importance."). Accordingly, a "special factor counseling hesitation in implying a *Bivens* action here is that [Plaintiff]'s claims can be seen as implicating the Government's whole response to the September 11 attacks, thus of necessity requiring an inquiry into sensitive issues of national security." *Vanderklok*, 868 F.3d at 206 (quotation omitted).

"Matters intimately related to . . . national security" are "rarely proper subjects for judicial intervention," *Haig v. Agee*, 453 U.S. 280, 292 (1981), because "[n]ational-security policy is the prerogative of the Congress and President," *Abbasi*, 137 S. Ct. at 1861 (citing U.S. Const. Art. I, § 8; Art. II, § 1, § 2). Reluctance to craft new remedies "in a case with national security implications must be particularly 'pronounced when the judicial inquiry comes in the context of a claim seeking money damages rather than a claim seeking injunctive or other equitable relief.'" *Vanderklok*, 868 F.3d at 207 (quoting *Abbasi*, 137 S. Ct. at 1861). It is therefore unsurprising that the Supreme Court has never implied a *Bivens* remedy in a case involving national security concerns. *See Doe v. Rumsfeld*, 683 F.3d 390, 394 (D.C. Cir. 2012). The risk of interfering with

the government's ability to ensure security is certainly a special factor that should prompt hesitation in allowing a damages cause of action against screening personnel. *See Vanderklok*, 868 F.3d at 209 ("Ultimately, the role of the TSA in securing public safety is so significant that we ought not create a damages remedy in this context."); *Scruggs*, 2019 WL 1382159, at *5 & n.9 (declining to extend *Bivens* to TSA screening context due, in part, to "national-security issues").[18]

Third, recognizing a Fourth Amendment damages claim against TSA screeners under the circumstances here would create an unworkable category of constitutional litigation. Last year, TSA's front-line employees working at airport checkpoints screened an average of more than 2.2 million people every day.[19] Permitting a cause of action against individual TSA employees whenever an airline passenger believes that some element of the security screening process was too invasive of his or her privacy would bring a huge number of daily interactions "within the *Bivens* regime." *Wilkie*, 551 U.S. at 561. Neither Congress nor the Supreme Court has ever indicated that individual-capacity damages claims should be so broadly available against federal employees who are not law enforcement officers. "[A]cross this enormous swath of potential litigation would hover the difficulty of devising a . . . standard that could guide an employee's conduct" or "a judicial factfinder's conclusion." *Id.*

Although airport security screening is directed by TSA's comprehensive SOP, application of the prescribed procedures to the limitless variety of passengers and circumstances at a

[18] *See also Arar*, 585 F.3d at 575 (identifying as a special factor the Supreme Court's rulings that "matters touching upon . . . national security fall within an area of executive action in which courts have long been hesitant to intrude absent congressional authorization" (quotations omitted)); *Rasul v. Myers*, 563 F.3d 527, 532, n.5 (D.C. Cir. 2009) (finding that the risk of obstructing national security policy was a special factor).

[19] "TSA Year in Review: A Record Setting 2018," Feb. 7, 2019, available at https://www.tsa.gov/blog/2019/02/07/tsa-year-review-record-setting-2018 ("A total [of] 813.8 million (813,791,287) passengers and crew members passed through TSA screening.").

checkpoint still necessarily involves a degree of "discretionary decisionmaking based on a vast array of subjective, individualized assessments." *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 603 (2008). "In such situations, allowing a challenge based on the" allegedly "arbitrary singling out of a particular person would undermine the very discretion that such . . . officials are entrusted to exercise." *Id.*; *see also* (Doc. 10 at 6) (stating Plaintiff's argument that she was "singled out" for "unique treatment, different than similarly situated passengers"). Even in the highly circumscribed context of airport screening, the sheer volume of passengers leads to TSA screeners being called upon, on occasion, to make ad hoc, multifactorial determinations that do not lend themselves to a clear standard. *See Wilkie*, 551 U.S. at 554 (describing "the difficulty of defining limits to legitimate zeal on the public's behalf"). In such situations, courts are not well positioned to second guess, for example, a TSA's screener's decision that additional screening was necessary to ensure that an object felt under clothing during a pat-down was not a potential threat. *See id.* at 562 (declining to recognize a *Bivens* remedy when "a judicial standard" applicable to the claim would be "endlessly knotty to work out"); *see also Ruskai*, 775 F.3d at 77 (describing the need for "deference to TSA's expertise regarding the nature of evolving threats, how people behave in airports, and the capabilities of TSA's workforce and systems"); *infra* n. 25.

Finally, the Court should consider the potential chilling effect of recognizing a *Bivens* remedy in the context of airport security, where "the stakes are so high and the consequences of a lapse in security so potentially catastrophic." *Mohamed*, 995 F. Supp. 2d at 527. TSA screeners "who face personal liability for damages might refrain from taking urgent and lawful action" to respond to potential threats. *Abbasi*, 137 S. Ct. at 1863. Fear of landing in court with personal assets on the line could seriously jeopardize TSA screeners' confidence in making critical, quick decisions and ensuring that every screening they perform is fully effective. If screeners fear

exposure to personal liability – a fear that may be heightened in situations when the SOP affords a degree of discretion, the nature of a potential threat is unclear, or a passenger is acrimonious and uncooperative – they may hesitate or refrain from the thoroughness necessary to ensure that no prohibited item or potential threat gets through the checkpoint. Congress and the Supreme Court have recognized that it is not in the public interest for liability concerns to cause hesitancy and restraint in the context of airport security.[20] As the Third Circuit recognized in *Vanderklok*, "[t]he threat of damages liability could indeed increase the probability that a TSA agent would hesitate in making split-second decisions about suspicious passengers. In light of Supreme Court precedent, past and very recent, that is surely a special factor that gives us pause." 868 F.3d at 207.[21] This Court should be wary that opening the door to *Bivens* actions against TSA screeners under the circumstances here could have unintended consequences on security effectiveness. *See Wilkie*, 551 U.S. at 561 ("The point here is not to deny that Government employees sometimes overreach . . . . The point is the reasonable fear that a general *Bivens* cure would be worse than the disease.").

In sum, significant special factors certainly should cause hesitation in allowing a *Bivens* remedy in this case. Given the tremendous volume of interactions between the public and TSA

[20] *See Air Wisconsin Airlines Corp. v. Hoeper*, 571 U.S. 237, 253 & 256 (2014) (explaining that Congress enacted a law granting civil immunity from defamation for reporting suspicious airline passenger behavior so that "[b]aggage handlers, flight attendants, gate agents, and other airline employees who report suspicious behavior to the TSA should not face financial ruin if, in the heat of a potential threat, they fail to choose their words with exacting care," and finding that "[i]f such slips of the tongue could give rise to major financial liability," airline employees would be chilled from contacting TSA to report threats – "exactly the kind of hesitation that Congress aimed to avoid").

[21] *See also Tobey v. Jones*, 706 F.3d 379, 394 (4th Cir. 2013) (Wilkinson, J., dissenting) (noting that given "the protracted burdens of a lawsuit and the prospect of . . . damages liability . . . I would expect other TSA agents to refrain from responding to some unknown quantum of future security threats").

screeners, the variety of ways to pursue relief when aggrieved by those interactions, the nature of screeners' critical national security function, and the risk of chilling them from thorough execution of their duties, exposing TSA screening employees to *Bivens* claims for money damages from their personal assets is inappropriate and unnecessary. *See Southerland v. City of New York*, 681 F.3d 122, 137 (2d Cir. 2012) (Jacobs, C.J., dissenting) ("An individual defendant has at stake his savings, his pension, the equity in his home, the kids' college fund[.]"). When hesitation is counseled, courts should leave the question to Congress and decline to imply a cause of action.[22] Accordingly, dismissal of the Fourth Amendment claims against the Individual Defendants is appropriate.

B. The Individual Defendants Are Entitled to Qualified Immunity.

Even if a *Bivens* cause of action could be implied under the circumstances here, Plaintiff's Fourth Amendment claims should still be dismissed because the Individual Defendants are entitled to qualified immunity. The doctrine of qualified immunity recognizes that subjecting public officials to personal liability for their actions distracts those officials from their duties, inhibits their actions, and may deter qualified people from accepting public service. *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982). Qualified immunity "protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quotation omitted). The doctrine "gives government officials breathing room to make reasonable but mistaken judgments about open legal questions." *Lane v. Franks*,

[22] *See Abbasi*, 137 S. Ct. at 1858 ("In sum, if there are sound reasons to think Congress *might* doubt the efficacy or necessity of a damages remedy as part of the system for enforcing the law and correcting a wrong, the courts *must* refrain from creating the remedy in order to respect the role of Congress[.]" (emphasis added)).

573 U.S. 228, 243 (2014) (quotation omitted). "The protection extends beyond mistakes of law." *Singh v. Cordle*, 936 F.3d 1022, 1033 (10th Cir. 2019). It "applies regardless of whether the government official's error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." *Pearson*, 555 U.S. at 231 (quotation omitted). "A mistake of fact must, of course, be a reasonable one." *Singh*, 936 F.3d at 1033 (citation omitted).

"When a defendant raises the defense of qualified immunity, the plaintiff bears the burden to demonstrate that the defendant violated his constitutional rights and that the right was clearly established." *Id.* (quotation omitted). The law was "clearly established" only if it "was sufficiently clear that *every* reasonable official would understand that what he [was] doing [was] unlawful." *Dist. of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (quotation omitted and emphasis added). To make such a showing in this circuit, the plaintiff "must point to a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Callahan v. Unified Gov't of Wyandotte Cty.*, 806 F.3d 1022, 1027 (10th Cir. 2015) (quotation omitted). "[I]f a reasonable officer *might* not have known *for certain* that the conduct was unlawful—then the officer is immune from liability." *Abbasi*, 137 S. Ct. at 1867 (emphasis added). Public officials "enjoy a presumption of immunity when the defense of qualified immunity is raised." *Pahls v. Thomas*, 718 F.3d 1210, 1227 (10th Cir. 2013). Here, Plaintiff cannot carry her burden to rebut that presumption.

As an initial matter, Plaintiff's claims against the two Individual Defendants are entirely based on undifferentiated "collective allegations." *Id.* at 1225. Plaintiff therefore has not plausibly alleged that either TSA employee personally did anything that violated the Fourth Amendment.[23]

[23] *Pahls*, 718 F.3d at 1225-26 ("Because § 1983 and *Bivens* are vehicles for imposing personal liability on government officials, we have stressed the need for careful attention to particulars, especially in lawsuits involving multiple defendants. It is particularly important that plaintiffs

The First Amended Complaint contains only undifferentiated allegations against both screeners, without any explanation of which individual took each particular action relevant to Plaintiff's claims. *See* (Doc. 12 at ¶¶ 35, 37, 39, 41-42). Accordingly, it fails as a matter of law to state a Fourth Amendment claim against anyone in particular.[24]

Even if Plaintiff's claims could be particularized based on allegations specific to each Individual Defendant, it is clear that none of the conduct collectively ascribed to both Individual Defendants violated a Fourth Amendment right that was clearly established by controlling precedent in this circuit. In fact, the Individual Defendants are not aware of *any* judicial decision that has clearly and specifically marked constitutional limits on the extent to which TSA screeners may take additional steps to ensure that an object felt under clothing during a pat-down is not a prohibited item or a potential threat to transportation security.[25] Accordingly, the Individual

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make clear exactly *who* is alleged to have done *what* to *whom*, . . . as distinguished from collective allegations. When various officials have taken different actions with respect to a plaintiff, the plaintiff's facile, passive-voice showing that his rights "were violated" will not suffice. Likewise insufficient is a plaintiff's more active-voice yet undifferentiated contention that 'defendants' infringed his rights. Rather, it is incumbent upon a plaintiff to identify *specific* actions taken by *particular* defendants in order to make out a viable § 1983 or *Bivens* claim." (internal quotations and citations omitted)).

[24] Notably, it appears that one of the Individual Defendants was only involved in Plaintiff's screening by serving as a witness to the additional screening that occurred in the private room. *See* "Security Screening," available at: https://www.tsa.gov/travel/security-screening ("A second officer of the same gender will always be present during private screening."); (Doc. 12 at ¶ 34) (alleging that a second screener was not involved until Plaintiff was escorted to the private screening room). Plaintiff has not alleged that the Individual Defendant who served as a witness had any role in making decisions about how to screen Plaintiff.

[25] Courts may be understandably wary about imposing specific constitutional restrictions on TSA employees' ability to make critical decisions about applying additional screening procedures. Given that we live "[i]n a world where air passenger safety must contend with such nuanced threats as attempts to convert underwear into bombs," attempting to set bright line constitutional rules that should be applicable to every possible situation is difficult and could have unintended consequences on security effectiveness. *George v. Rehiel*, 738 F.3d 562, 578 (3d Cir. 2013); *see also United States v. McCarty*, 648 F.3d 820, 825 (9th Cir. 2011) (noting that "thin, flat explosives called 'sheet explosives' may be disguised as a simple piece of paper or cardboard, and may be

Defendants here reasonably could have believed that their alleged conduct was within the bounds of the Fourth Amendment.

Ultimately, Plaintiff is attempting to make new Fourth Amendment law with this case. While she certainly has the right to raise a novel constitutional challenge to the screening procedures she allegedly experienced, she may not do so with the vehicle of personal-capacity damages claims against individual TSA employees. Qualified immunity protects those employees from exposure to personal liability because no existing judicial decisions had established bright line rules to govern their conduct. Plaintiff's claims against the Individual Defendants should be dismissed.

IV. CONCLUSION

For the foregoing reasons, the Individual Defendants respectfully request that Plaintiff's Fourth Amendment claims asserted against them be dismissed with prejudice.[26]

hidden in just about anything"); *United States v. Abdulmutallab*, 739 F.3d 891, 895 (6th Cir. 2014) (affirming conviction of "underwear bomber"); 81 Fed. Reg. at 11,384 (noting that TSA screeners face the "known threat posed by" explosives deliberately "concealed on culturally sensitive areas of the body" in an effort to exploit the natural hesitancy to thoroughly search those areas).

[26] *See, e.g.*, *Pao Xiong v. McCormick*, No. 17-cv-873, 2019 WL 4198630, at *9 (W.D. Okla. Jul. 24, 2019) (recommending dismissal with prejudice of putative *Bivens* claim when it was not appropriate to recognize a *Bivens* remedy in the new context presented by the case), *report & recommendation adopted by* 2019 WL 4197602 (W.D. Okla. Sep. 3, 2019); *Millbrook v. Spitz*, No. 18-cv-2667, 2019 WL 5790701, at *11 (D. Colo. Aug. 26, 2019) (same), *report & recommendation adopted by* 2019 WL 4594275 (D. Colo. Sep. 23, 2019).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will send notification of such filings to the parties entitled to receive notice.

s/Michelle Hammock
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Paralegal Specialist